THE CORPORATE TAX PLANNING LAW REVIEW

SECOND EDITION

Editors
Jodi J Schwartz and Swift S O Edgar

THE LAWREVIEWS

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PREFACE

We are pleased to present the second edition of *The Corporate Tax Planning Review*. This volume contains 22 chapters, each devoted to a different country and each providing expert analysis by leading practitioners of the most important aspects of tax planning for multinational corporate groups in that country, with a particular focus on recent developments.

The jurisdictions represented in this volume are diverse and include established major economies (e.g., the United States, Germany, Korea, etc.); EU countries both that have become popular destinations for new business organisations and those where multinationals tend to form entities to facilitate local operations or investments; the city states of Singapore and Monaco; and several nations in the Global South (Colombia, Venezuela, Malaysia and more). Echoing this geographical variety, *The Corporate Tax Planning Review* describes tax developments worldwide that respond to different challenges in different places. At the same time, many countries share goals of preventing jurisdiction-shopping, protecting against erosion of the tax base, promoting local investment and raising revenues. These complex and at times conflicting goals present opportunities for the well advised and traps for the unwary.

While each chapter discusses issues at the cutting edge of tax law, the authors have contextualised their analyses with sufficient background information to make this volume accessible and useful to generalists and to tax practitioners outside each particular jurisdiction. Although *The Corporate Tax Planning Review* is by its nature an abbreviated overview, we hope it will at least serve as a workable compass to in-house counsel and outside advisers as they attempt to navigate their clients through the unsteady and at times uncharted waters of contemporary corporate tax planning.

We are extremely grateful to the contributors who have assiduously distilled a wealth of expertise to create this volume and to Nick Barette, Gavin Jordan, Tommy Lawson and Adam Myers at Law Business Research Limited for their editorial acumen and dedication to this project.

Jodi J Schwartz
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Chapter 14

NIGERIA

Stephen Chima Arubike, Marian Asuenimhen and Ayodele Ashiata Kadiri[1]

I INTRODUCTION

Nigeria is a federation with 36 states and a federal capital territory. Each of the federation, the governments of the federating states and the local governments within each of the states has a limited power to impose and collect taxes. The division of powers among these levels of government is not without controversy. Very broadly speaking, by virtue of the Constitution,[2] the federation imposes stamp duties, capital gains and income taxes, and by legislation, it can also collect these taxes from companies, but the federation has by legislation delegated the collection (not the imposition) of personal income tax and, where both parties are private individuals, stamp duties and capital gains taxes, to the states.

The Constitution is silent on value added and landed property taxes. In practice, the former is imposed and collected by the federation, while the latter is imposed and collected by the states and local governments. The powers of the federation over value added tax are the subject of litigation pending at the Supreme Court. The states have a record of, in effect, usurping the constitutional powers of the local governments in respect of signage permits, tenement rates, liquor licences and market fees. Consistent with the Constitution, the states also have a record of imposing taxes on various matters such as the environment, the development of aspects of infrastructure, hospitality, entertainment, advertisement and provision of social services.

To help the states to raise more money for themselves and reduce the burden of tax on the taxpayers, the Taxes and Levies (Approved List for Collection) Act (the Taxes Act) was enacted by the Federal Military government in 1998 shortly before the Constitution came into force in 1999. The Taxes Act also established the Joint Tax Board (JTB), whose members comprise the heads of tax authorities for the federal and states governments. JTB's role is mainly to harmonise the administration of personal income taxes throughout the country.

By the Taxes Act, the federal government purported to extend states' powers to impose taxes beyond what the Constitution appears to allow, for example: land use charge; hotel, restaurant or event centre consumption tax; entertainment tax; ecological fees; produce sales tax; infrastructure maintenance charge, property tax; economic development levy; social service contribution levy; and signage and advertisement.[3] The courts have not yet determined the extent to which the Taxes Act passes constitutional muster.

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1 Stephen Chima Arubike is a senior associate and both Marian Asuenimhen and Ayodele Ashiata Kadiri are associates at G Elias & Co.

2 The Constitution of the Federal Republic of Nigeria, 1999 (as amended).

3 Schedule to the Taxes and Levies (Approved List for Collection) Act (Amendment) Order, 2015.

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In view of these constitutional issues and many other points that will be made below, the law covered in this chapter is complex and uncertain and is constantly changing. The opportunities and risks in relation to tax planning activities are considerable.

II LOCAL DEVELOPMENTS

Tax remained a topical issue in Nigerian all through 2019. Nigeria's oil revenue crunch that started in 2014 has forced the government at all levels to take aggressive steps to widen the tax base, increase tax compliance, introduce new taxes and increase the rate of some existing taxes.[4]

The year was ushered in with the controversial freezing of bank accounts of the alleged tax defaulters by the Federal Internal Revenue Service (FIRS)[5] purportedly in the exercise of its statutory power. The FIRS also commenced enforcing the weighty penalties (including the sum of 20 million naira upon default and 10,000 naira for every day the default continues)[6] in the Income Tax Transfer Pricing Regulations 2018 (the TP Regulations) and the Income Tax (Country by Country Reporting) Regulations 2018 (the CbCR Regulations) both of which were promulgated in 2018. The FIRS in July 2019 issued the Common Reporting Standard Regulations (the CRS Regulations). This was to give effect to the Multilateral Convention on Mutual Administrative Assistance in Tax Matters and the Multilateral Competent Authority Agreement on automatic exchange of financial account information which Nigeria acceded to in 2017.[7]

The lawmakers have supported the government's tax drive initiatives. In April 2019, the federal parliament enacted the Nigeria Police Trust Fund Act, 2019 (NPTF Act) which requires companies 'operating businesses' in Nigeria to contribute 0.005 per cent of their net profit to the trust fund established by the statute. Just before the end of 2019, the lawmakers passed the Finance Act 2019 (Finance Act) into law, and the same was signed by the President on 13 January 2020. The Finance Act introduced sweeping changes to key tax statutes. The statutes are the Companies Income Tax Act, 1977 (CITA); the Value Added Tax Act, 1993 (the VAT Act); the Petroleum Profits Tax Act, 1958 (PPTA); the Capital Gains Tax Act 1967 (CGTA); the Customs and Excise Tariff Etc. (Consolidation) Act, 1995; the Personal Income Tax Act, 1993; and the Stamp Duties Act, 1939.

Both the courts and the tax tribunals rendered key decisions in 2019 to resolve several tax disputes between taxpayers and the revenue authorities. We will discuss some of these developments and decisions in the succeeding paragraphs.

i Entity selection and business operations

The business organisation vehicles recognised in Nigeria include companies limited by shares (CLSs), partnerships and trust. CLSs (private or public) are organised under the Companies and Allied Matters Act, 1990 (CAMA).

4 At 6 per cent, Nigeria's tax to GDP ratio is one of the lowest in the world www.imf.org/~/media/Files/Publications/CR/2018/cr1864.ashx (last assessed 4 March 2019).

5 The federal tax administrative agency.

6 TP Regulations, Section 13(8).

7 https://pwcnigeria.typepad.com/tax_matters_nigeria/2019/09/the-firs-has-published-regulations-on-common-reporting-standard.html#:~:text=This%20follows%20Nigeria's%20signing%20of,Nigeria%20on%2017%20August%202017 (last accessed 11 March 2020).

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By law, two or more adult individuals can form a CLS. Partnerships are organised under state laws, although the right to use any business (including partnership) name exclusively is a matter of federal law. The Lagos State Partnership Law (2009) and those of some other states introduced limited partnerships. Partnerships in Nigeria (as distinct from the partners themselves), whether limited or not, are mere 'pass-through-vehicles' and do not pay income tax.

Tax-exempt vehicles include approved charitable organisations, educational institutions, cooperative societies, religious bodies, trade unions and companies formed to promote sports. These vehicles may be organised either as trusts at common law or under CAMA, either as companies limited by guarantee (CLGs) or as incorporated trustees. While CLGs have only members and directors, incorporated trustees have both members and trustees. The tax-exempt status of these vehicles is limited to income generated from their explicitly mandated activities and does not apply where they engage in business outside those activities.

Businesses in Nigeria can also be organised as statutory corporations created directly by legislation. Statutory corporations may or may not be tax-exempt depending on the establishing law and the purpose of setting it up. For instance, statutory corporations set up to foster socio-economic development are typically tax-exempt. On the other hand, some statutory corporations, such as the Nigerian National Petroleum Corporation, pay tax.

CLSs pay income tax on their taxable profits.[8] Besides, their distributable dividends are subject to withholding tax before they are paid out to the shareholders. Unlike CLSs, partnerships pay one level of tax on the partners' income only, and the rate for human partners (maximum of 20 per cent) is lower than the income tax rate for CLSs that are large companies (about 32 per cent).[9] Business organisations have no right to elect whether taxes are imposed on any particular entity type or 'flow through' to the individual owners.

A foreign investor can be a limited partner in a Nigerian partnership or buy shares in a Nigerian company without getting incorporated in Nigeria (the general partner will be the entity actually conducting the business), but it cannot do business in Nigeria except through a company that it incorporates in Nigeria for the purpose unless it has a special federal government permit to do so, and such permits are very uncommon. Trusts are taxed on the income paid out to the beneficiaries. The trustee of a unit trust scheme is treated as a company and the unit holders treated as shareholders for income tax purposes.

Domestic income tax

Nigerian companies pay income tax on their worldwide income to the extent that the income has not been subjected to other Nigerian tax.[10] The tax rates for large companies (annual revenue of 100 million naira and above) and medium-sized companies (annual revenue between 25 million naira and 100 million naira) are 30 per cent and 20 per cent of their taxable profit[11] respectively. However, small companies[12] pay no income tax but are required

8 See the material under the following header titled 'Domestic income tax'. With the enactment of the Finance Act, CLSs that qualify as small companies pay no companies income tax, but CLSs that qualify as medium and large companies would pay income taxes at the rate of 20 per cent and 30 per cent respectively.

9 See text to note 15 below.

10 CITA, Section 9; Finance Act, Section 1.

11 Taxable profit is essentially profit after recurrent expenses and allowances.

12 Companies with gross turnover of 25 million naira (annual revenue approximately US$55,000 or less).

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to file tax returns annually. Real estate investment companies approved by the Securities and Exchange Commission are exempted from income tax on rental income and dividends earned in a financial year provided that at least 75 per cent of this income is distributed within 12 months.

Additionally, Nigerian companies also pay tertiary education tax at 2 per cent of their assessable profit[13] and contribute 0.005 per cent of their net profit[14] to the trust fund established under the NPTF Act. Telecommunication companies, cyber companies and internet providers, pension fund managers and related companies, banks and other financial institutions and insurance companies with an annual turnover of 100 million naira and above are also required to pay 1 per cent of their profit before tax to the National Information Technology Development Fund. Upstream oil and gas companies pay income tax at rates ranging between 50 per cent and 85 per cent depending on the nature of each company's operations.

Nigerian companies are also obliged to withhold and remit tax at 10 per cent to the relevant tax authority (WHT) on dividend, interest, royalty and rent income paid to any person, whether or not resident in Nigeria. If an entity whose income has suffered WHT is subject to Nigerian tax, credit will be given on the WHT paid. For non-residents, WHT is a final tax. However, if the non-resident is from a country with a double taxation treaty with Nigeria,[15] WHT is to be remitted at the rate of 7.5 per cent rather than 10 per cent. Thus, using vehicles organised in double taxation treaty countries for direct investment in Nigeria is a widely used tax planning device. The WHT rate on payment for services rendered to companies engaged in road, bridges, building and power plant construction contracts has been revised and cannot exceed 2.5 per cent. Furthermore, the Finance Act has removed the exemption from WHT on income or dividends paid out of after-tax petroleum profits enjoyed by upstream oil and gas companies.[16]

International tax

The foreign income of a Nigerian company is taxable in Nigeria where the income is brought into or received in Nigeria. The profits of a Nigerian company are deemed to be income in Nigeria wherever they may have arisen and whether or not they have been brought into or received in Nigeria. Nigerian companies with foreign income may, therefore, manage their tax exposure by incorporating in tax-friendly jurisdictions foreign subsidiaries that will generate foreign export receipts and keep those receipts abroad rather than bringing them into Nigeria immediately. However, the passive, investment income of a Nigerian company derived from a source outside Nigeria is exempted from tax to the extent that it is brought

13 Assessable profit is essentially profit before expenses and allowances. With the amendments to the Finance Act, it is not clear that companies that qualify as small companies are still required to pay the education tax, even though they have been exempted from paying companies income tax. Lotteries companies are subject to a separate regime of taxes under the National Lottery (Amendment) Act, 2017. It is not clear also whether a lottery company that qualifies as a small company can take advantage of the exemption under the Finance Act.

14 Section 4(1)(b) of the NPTF Act.

15 Nigeria currently has double tax treaties (DTTs) with thirteen countries namely: The United Kingdom, The Netherlands, Canada, South Africa, China, Philippines, Pakistan, Romania, Belgium, France, Mauritius, South Korea and Italy.

16 Section 24.

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into Nigeria through a bank or other dealer licensed for the purpose by the Central Bank of Nigeria.[17] The taxation of the income of a Nigerian company from foreign sources may be subject to treaty arrangements between Nigeria and the source country.

Non-resident companies (NRCs), including Nigerian branches of foreign companies (on the rare occasions where these branches are permissible), are liable to tax only on their profit derived from Nigeria. NRCs that provide digital products and services to residents in Nigeria will now be subject to income tax in Nigeria if they have a significant economic presence in Nigeria and profits attributable to their activities. Also, NRCs providing professional, consultancy, management and technical services to Nigeria residents to the extent that these companies have a significant economic presence in Nigeria (if not already subject to income tax) will be subject to WHT of 10 per cent which shall be the final tax. The Minister is empowered to determine by order what constitutes 'significant economic presence', but is yet to do so.[18] Where the actual profits of an NRC cannot be determined, the FIRS has the power to apply a deemed profit rate on turnover derived from Nigeria in determining the applicable tax. In practice, the FIRS has used the rate on WHT – 10 per cent – here, but the statute does not specify a rate or limit.

A number of sectors enjoy tax holidays of up to five years on both the profits of operating companies and dividends declared by them. These sectors include manufacturing; export-oriented businesses; agricultural loans; petrochemical projects; and research and development activities. Also, enterprises in the various free trade zones are exempt from taxes, levies and duties and foreign exchange restrictions.[19]

A non-resident may also consider investing in Nigeria by way of debt rather than equity. There are three significant benefits here. A foreign loan on arm's-length terms with a repayment period of seven years or more enjoys a 70 per cent income tax exemption.[20] Second, where the Nigerian subsidiary pays interest on the loan, the interest (subject to a cap of 30 per cent of the Nigerian subsidiary's EBITDA), unlike dividends, will be deductible in the usual way in calculating the profits of the subsidiary. Third, interest payable on bonds and notes enjoys an exemption from companies' income tax under regulations that, for now, are set to expire on 1 January 2022. However, the exemption on bonds and notes with respect to personal (as distinct from companies) income tax is for an indefinite period.

Thus, widely used tax planning steps include pursuing free zone status and tax holiday certificates, foreign investment in Nigeria by way of long-term debt rather than equity and investing in debt by way of bonds and notes rather than loans.

Capitalisation requirements

The Finance Act has introduced 'thin capitalisation' rules in Nigeria. The rules limit the deductible interest expense from a company's taxable profit to a cap of 30 per cent of EBITDA in a connected party debt, including third-party debt guaranteed implicitly or explicitly by a connected person. Any interest expense in excess of 30 per cent of EBITDA can be carried forward but for a period of five years only.[21]

17 CITA, Section 23(k).
18 Finance Act, Section 4.
19 Section 18 of the NEPZA Act.
20 CITA, Section 11, Finance Act, Section 23 and the Third Schedule.
21 Finance Act, Section 10(b); Seventh Schedule.

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The former controversy[22] on the deductibility of interest on related-party loans concerning upstream oil and gas companies has now been resolved. Interest in the intra-group loans of such companies will be tax deductible[23] if they are made on arm's-length terms.

Nigeria has 'alternative minimum tax' rules. A company that has been in existence for over four years is liable to pay a minimum level of income tax if, in any year of assessment, it makes no profit or profit that is less than the applicable minimum tax.[24] The minimum tax is now fixed at the rate of 0.5 per cent of gross turnover, less franked investment income. The exemption once enjoyed by companies with up to 25 per cent of imported equity from minimum tax is no longer in force. Hence, reliance on imported equity as a tax planning device in this context is no longer attractive. However, investing in agriculture or small companies (both still exempt from minimum tax) is still a tax planning consideration.

ii Common ownership: group structures and intercompany transactions

Ownership structure of related parties

Nigerian laws do not provide for tax consolidation for a group of companies. Hence, group relief and group loss-sharing are not allowed in Nigeria. Each legal entity within a group is treated as distinct and separate for tax purposes and is not allowed to file group tax returns.

Although group loss sharing is not allowed, tax losses survive a change of ownership. Thus, a company in a group could merge with another to utilise the tax losses of the other for income tax purposes. The law ignores capital gains losses. Companies are permitted to carry losses indefinitely.

Further, Nigerian laws do not make any specific provisions relating to controlled foreign companies. There are also no specific rules in Nigeria relating to tiered partnerships.

Domestic intercompany transactions

Companies in Nigeria are permitted to deduct even related-party payments to reduce their overall net income. The only condition is that the transactions on which the payment arose must have been conducted at arm's length and the amount must be wholly, exclusively and necessarily applied to carry out the operations of the related party in generating profits chargeable to tax. Management services expense no longer requires prior governmental approval to be deductible once the same complies with TP Regulations.

Furthermore, dividend income received by a parent from its subsidiary is not subjected to further tax when redistributed to the shareholders of the parent. Such dividend income, having suffered WHT, is regarded as franked investment income under Nigerian law.[25]

International intercompany transactions

Nigerian authorities are taking active steps to prevent multinational enterprises from shifting income exposure to low-tax jurisdictions. Both the CITA and the CGTA prohibit companies from engaging in artificial or fictitious transactions. Additionally, Nigeria now has specific

22 This arose from the conflicting provisions in the Petroleum Profits Tax Act: Section 10(1)(g) (providing for tax-deductible interest on inter- company loans) and Section 13(2) (disallowing deduction of interest on loans between related entities).

23 *Nigeria Agip Oil Company Limited v. FIRS* (2014) 16 TLRN 25.

24 CITA, Section 33; Finance Act, Section 14.

25 CITA, Section 80(3).

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transfer pricing rules promulgated in 2012 and revised in 2018. The TP Regulations compel a connected person to declare its relationship with the other connected persons whether resident in or outside Nigeria and to make an annual disclosure of all its related party transactions. CbCR complements the TP Regulations in preventing profit shifting to low-tax jurisdictions. The way to manage the risk here is to ensure that the transaction is concluded on arm's-length terms and are specifically reported annually.

iii Third-party transactions

Third-party transactions can be structured through sales or exchange of shares, contractual transfer through assets for cash or statutory mergers resulting in dissolution without winding-up or other schemes of arrangements.

Sales of shares or assets for cash

Broadly speaking, share sales and exchanges are the most tax-efficient way of carrying out third-party transactions. Sales and exchanges of shares do not attract income tax, capital gains tax, VAT or *ad valorem* stamp tax. Since 1998, no capital gains tax has been payable on dispositions of shares. Only nominal stamp duty is payable on these transactions.[26]

Assets for cash transactions, on the other hand, attract capital gains tax, *ad valorem* stamp duty tax where the assets are not goods and, where the assets are goods, VAT. On deals made between companies that have 90 per cent common ownership, *ad valorem* stamp duty is not charged.[27] Further, if the assets are landed property, the transfer will not attract VAT but will attract state registration fees and other landed property taxes that vary from state to state.

Third-party transactions for the acquisition of business assets can also be effected through statutory mergers. Payment of stamp duties is avoided where the consideration is not cash and one of the entities is dissolved. However, if assets transferred on a merger include land, the surviving entity may have to pay registration and consent fees at the lands' registry of the state where the property is located. Regulatory practice on this point varies from state to state.

Disposals of the interests of holders of oil leases, prospecting licences or production licences to a third party, whether by share sales or exchange, assets sale or purchase, or merger, require the prior consent of the federal minister in charge of petroleum resources. Stamp duty and capital gains tax will arise on such disposals in principle, but in practice negotiation with the FIRS of relief on such transactions is not unknown.

Tax-free or tax-deferred transactions

Asset for cash transactions may result in rollover relief. Rollover relief allows a party to defer the payment of capital gains tax where the disposal proceeds of a business asset are reinvested in a new, replacement business asset. The deferral is achieved by deducting the chargeable gain from the cost of the new assets. This relief could be either full or partial.

Asset for cash transactions that qualify for rollover relief lead to tax deferral as distinct from tax-free transactions arising from sale of shares. Corporate reorganisation involving a

26 In practice, the authorities insist on payment of *ad valorem* duties where parties execute a well-drawn agreement for the transaction rather than a mere share transfer form.

27 Stamp Duty Act, Section 105.

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sale of business or its asset would not be subject to either capital gains tax or VAT if (1) the companies involved are related and have been so for a period of at least 365 days prior to the date of the reorganisation and (2) the transferee or purchaser company holds this trade or business (or assets employed therein) for no less than 365 days after the transaction date. Where the statutory minimum holding period is not adhered to, the tax authority can treat the companies as 'if they did not qualify for the concessions stipulated . . . as at the date of the initial reorganisation'.[28]

International considerations

There is no special tax consideration to cross-border third-party transactions or differences between the tax consequences of similar structured domestic and cross-border deals. Gains realised from the sale of shares by a non-resident (whether resident in or outside Nigeria) are treated in the same way as sales by a resident company and thus not taxable.

To avoid paying stamp duty, a company may keep transaction documents abroad as Nigerian law mandates stamping a document only when the document is brought into Nigeria.

However, for capital gains tax on asset disposals, residency rules apply. Disposals of assets situated outside Nigeria will be liable to capital gains tax in Nigeria where the disposition of the assets is by an individual who is liable to pay tax in Nigeria by virtue of the residency rules, that is someone who stays in Nigeria for more than 182 days in that same year.[29] Where the circumstances permit, transactions should be structured to let the disposing entity be a foreign one rather than a local one.

iv Indirect taxes

VAT has been a significant indirect tax in Nigeria since the first federal statute on it was passed in 1993. It is chargeable on the supply of all goods and services except those specifically exempted. All business vehicles, government agencies, and departments must deduct VAT on their incoming invoices and transactions with counterparties and remit the same to the FIRS. Effective February 2020, the Finance Act increased the VAT rate from 5 per cent to 7.5 per cent,[30] but now exempts businesses with an annual turnover of less than 25 million naira from VAT.

By virtue of the new Finance Act, VAT is now chargeable for services rendered by a non-resident with no physical presence in Nigeria to a Nigerian recipient. The new provision has firmly endorsed the 'destination principle' rule – a rule whose applicability in Nigeria has been controversial before now.[31] Additionally, some states now charge and collect consumption taxes on hotels, restaurants and event centres.

Nigeria also levies customs duties on goods imported into Nigeria. The amount payable is based on the costs of freight and insurance, which is the complete shipping value. The rates vary for different items and are assessed with reference to the prevailing harmonised commodity and coding system.

28 Finance Act, Sections 45 and 49.

29 CGTA, Section 4.

30 Finance Act, Section 34.

31 *Vodacom Business Nigeria Limited v. FIRS* (Appeal No. CA/LA/L/556/2018).

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Some goods such as beers, wines, spirits, cigarettes, and tobacco manufactured and sold in Nigeria are liable to excise duties. Effective 4 June 2018, the government approved an increase in the excise duty rates on tobacco and alcoholic beverages.

III INTERNATIONAL DEVELOPMENTS AND LOCAL RESPONSES

i OECD-G20 BEPS initiative

Nigeria has been responsive to the Organisation for Economic Co-operation and Development (OECD) and G20 Base-Erosion and Profit-Shifting (BEPS) and other measures to curb double non-taxation.

On 17 August 2017, Nigeria signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS and the Common Reporting Standard Multilateral Competent Authority Agreement.

Further to the signing of these multilateral instruments, the government introduced CbCR and revised the TP Regulations. The TP Regulations incorporates the 2017 updates to the OECD's TP Guidelines and the African Tax Administration Forum's Suggested Approach to drafting TP legislation.

Further, the FIRS in July 2019 issued the CRS Regulations. The CRS Regulations require the relevant financial institutions to file annual returns with respect to reportable accounts of individuals and companies.

ii EU proposals on taxation of the digital economy

Nigeria has now taken legislative actions in response to the European Commission's proposal on the taxation of the digital economy following the enactment of the Finance Act. Presently, income derived by NRC providing digital products or services will now be taxable in Nigeria[32] if the NRC has a significant economic presence in Nigeria and the relevant income is attributable to this activity. Similarly, NRCs providing technical, management, consultancy or professional services outside of Nigeria to a person resident in Nigeria is taxable in Nigeria to the extent that the company has significant economic presence and profit can be attributable to this activity.

iii Tax treaties

Nigeria entered DTTs to attract foreign investment into the country by preventing double taxation. The power to enter an international treaty in Nigeria is shared between the executive and the legislative organs. A treaty between Nigeria and another state, in addition to ratification by the executive branch, must be enacted into law by the federal legislature if it is to have the force of law,[33] but a regulator has the power to issue regulations that in effect have the same content as the treaty even where the treaty has not been enacted as primary legislation.

Lately, Nigeria has been taking steps to assist taxpayers in assessing the DTTs provisions. On 21 February 2019, the FIRS issued Guidelines on Mutual Agreement Procedure (MAP) to provide clarity on the procedures for accessing MAP for dispute resolution purposes pursuant to the DTT between Nigeria and each of its treaty partners. A taxpayer resident in

32 See general the 'International tax' subheading in Section II and text to note 19.

33 Constitution, Section 12.

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Nigeria can apply for MAP if either or both Nigeria and its treaty partner's tax authorities impose any tax on the taxpayer outside the relevant DTT. On 4 December 2019, the FIRS also issued a Public Notice on its Information Circular No. 2019/03 regarding tax treaty benefits claims in Nigeria (the Circular). The Circular guides and clarifies the requirements and processes for accessing and computing various tax treaty benefits available to residents and non-residents deriving income from Nigeria and its treaty partners.

Notable typical or model provisions

The OECD model forms the basis for Nigeria's DTTs. Hence, Nigeria's current DTTs tackle base erosion and profit shifting and other treaty-abusing designs of MNEs. Nigeria DTTs set out the withholding tax rights of the respective countries on dividends, interest and, royalties. The rate does not exceed 7.5 per cent of the gross amount, which is lower than those of non-treaty countries that pay a flat withholding tax rate of 10 per cent.

Recent changes to and outlook for treaty network

Nigeria's DTT network is not very wide, but it has been expanded recently. There are presently only 14 tax treaties in force. The federal legislature ratified the DTTs with Spain, Sweden and South Korea in January 2018. Those with Singapore, Ghana and Cameroon have been approved but not yet ratified. The TP Regulations identifies international and regional treaties as ways of attracting foreign direct investments to Nigeria and signifies the federal government's plans to expand its DTT networks further.

IV RECENT CASES

The aggressive tax drives by the authorities at all levels have spurred tax litigation in Nigeria lately. Besides, tax audits are being conducted and repeated routinely by the tax authorities. Both the regular courts and the tax tribunals have in recent times delivered several rulings and judgments on these tax disputes. One of the decisions borders on the powers of the states government to impose hotel occupancy and restaurant consumption tax (a variant of GST) notwithstanding the existing VAT being imposed in respect of those categories and administered by the federation. The Federal High Court ruled in favour of Lagos State on that matter.

i Perceived abuses

The courts and the tax tribunals have been consistent in checking the governments' resort to self-help and failure to follow the formal judicial process in resolving tax disputes. For instance, the court has construed the limit of the tax authority's power in effect to recover tax vicariously being exercised by the FIRS following the directives it issued to banks to freeze taxpayers' bank accounts. In *Etuwewe v. FIRS et al*[34] the Federal High Court nullified the FIRS' directives to a bank to freeze a taxpayer's account without first obtaining a court order to do so.

34 Suit No. FHC/WR/CS/17/2019.

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In *Guaranty Trust Bank Plc v. ESBIR*,[35] the Court of Appeal decided that the power of the tax of authorities to distrain the assets of a taxpayer can only be exercised where the tax in issue has become final and conclusive. Similarly, in *Ponticelli Upstream v. FIRS*,[36] the tax tribunal ruled that a tax assessment notice issued by the tax authority with a prior indication of the authority's refusal to amend the assessment notice (before even receiving an objection to the assessment) is invalid for being an abuse of the taxpayer's constitutional right to a fair hearing. Where, however, the taxpayer failed to object to a tax assessment within the statutorily prescribed period, the assessed amount will become final and conclusive, and the taxpayer must pay the assessed amount.[37]

The tax tribunals have made recent pronouncements on the TP Regulations. On 19 February 2020, the tribunal decided[38] that the burden is on the taxpayer to prove that a related party transaction was carried out at arm's length and that the tax authority can apply any acceptable criteria (including the Transactional Net Margin Method) in determining the taxpayer's compliance with the 'arm's-length' principle. The Tribunal had in the earlier case, *Comviva Technologies Nigeria Ltd v. FIRS*,[39] refused the tax authority's position to reject business expenses as allowable deductions merely because the expenses arose from intra-group transactions. In that case, the tax authority did not exercise its discretion rejecting the expenses under any known TP criteria, for example, by comparing the expenses with similar ones within the industry.

V OUTLOOK AND CONCLUSIONS

The changes the Finance Act has introduced to various tax statutes will shape Nigeria's tax space in the year 2020 and beyond. There will certainly be a rethink of the tax planning activities of the MNEs in response to the Finance Act provisions.

It expected that the OECD consensus-based solution to the taxation of digital products and services will be finalised later this year to put a stop to the unilateral measures being taken by countries in addressing the tax challenges of the digital economy. Perhaps Nigeria will align its laws on digital tax with the OECD consensus-based solution when the same takes effect. It is yet to be seen whether the Minister of Finance will issue an order effecting the implementation of the digital tax introduced by the Finance Act before the OECD consensus-based solution takes effect.

We expect the lawmakers to enact the remaining pieces of legislation that make up the Petroleum Industry Bill (including the Petroleum Industry Fiscal Bill) given the expected positive impact the PIB proposed reforms in the oil and gas industry will have on the Nigerian economy. The implementation of the NPTF Act will begin this year. The FIRS is expected to continue the TP audits that it started last year and, perhaps, some aspects of the TP Regulations will be tested in courts or the tax tribunals.

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35 (2018) LPELR-46307 (CA).

36 Appeal No. TAT/LZ/CIT/029/2017.

37 *United Capital Assets Management Ltd v. FIRS* (Consolidated Appeal Nos. TAT/LZ/CIT/006/2018 and TAT/LZ/CIT/007/2018).

38 *Prime Plastichem Nigeria Limited v. FIRS* Appeal No. TAT/LZ/CIT/015/2017.

39 Appeal No. TAT/LZ/CIT/016/2016. G Elias & Co represented Comviva Technologies Nigeria Ltd in that case.

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The recent judgment of the Federal High Court upholding the validity of the Hotel Occupancy and Restaurant Consumption Law of Lagos will probably encourage other states in Nigeria to enact their statutes on the subject unless the judgment is upturned on appeal. The improved speed of resolving tax disputes following the reconstitution of the tax tribunals is a welcome development. This will boost investors' confidence and increase the ease of doing business in Nigeria.

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Appendix 1

ABOUT THE AUTHORS

STEPHEN CHIMA ARUBIKE

G Elias & Co

Stephen is a senior associate in the firm and an experienced senior lawyer with a demonstrated history of advising top multinational corporations in all areas of Nigerian law. Between July and October 2018, he was seconded to the Johannesburg office of Allen & Overy. He has represented leading global clients in seminal tax litigation before the tax tribunal and superior courts in Nigeria and before regulators during tax audits and investigations. He has also advised on the tax dimension to numerous seminal corporate and financial transactions and commercial arrangements. He led the firm's tax team that successfully represented a Nigerian subsidiary of a global tech company on the deductibility of intra-group service expenses. He has outstanding academic qualifications as he graduated with a first-class honour from the Nigerian Law School, winning one of the overall best prizes. Stephen is a fellow of the Chartered Institute of Taxation of Nigeria and a member of the Nigerian Bar Association, the Lagos Court of International Arbitration and the Chartered Institute of Arbitration.

MARIAN ASUENIMHEN

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Marian Asuenimhen is an associate in the firm's dispute resolution, tax, and corporate practices. She regularly advises clients on structuring tax-efficient transactions. She also represents clients before the regulators during tax investigations and audits, and in tax tribunals and Nigeria's superior courts. She has advised clients on compliance and structuring issues under the Nigerian transfer pricing regulations regime. She was a member of the Firm's tax team that recently successfully represented a Nigerian subsidiary of a global tech company on several tax issues including the deductibility of intra-group service expenses. She also advises clients on corporate and employment law.

AYODELE ASHIATA KADIRI

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Ashiata is an associate and member of the firm's disputes, and telecommunications, media and technology groups. She has excellent academic qualifications. She finished as the best graduating student at the Nigerian Law School and was awarded an internship placement at Stephenson Harwood LLP. She represents clients at court and arbitral proceedings. Her non-dispute work cuts across acquisitions, finance (including capital markets) and regulatory

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compliance. She regularly advises on the tax implications for these transactions and tax considerations for foreign investors and international entities looking to set up operations in Nigeria.

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